Fractured logic--legal developments

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Environment analysis: Over the last month or so, the Infrastructure Bill has received Royal Assent, and wholesale oil and gas prices have plummeted. Fracking has again been in the news. So what has really happened and what can be expected? In the first of this three-part series, Tim Pugh, partner in the planning, environment and infrastructure team at Berwin Leighton Paisner, talks us through the latest developments.

The series

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What have been the latest developments around fracking?

The past few months have witnessed legal, practical and political challenges.

Government spokespeople have determinedly maintained parliamentary progress on the recently enacted Infrastructure Bill. The opposition and Greenpeace have variously proclaimed victory for the environment and castigated government for going back on concessions. Moratoria in Scotland and Wales have seemingly changed industry's landscape for the worse.

Legal

In purely legal terms, there have been two major developments:

- the relentless march of the Infrastructure Bill through Parliament to Royal Assent on 12 February 2015, and
- the decision of Gilbart J in *R (on the application of Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin), [2014] All ER (D) 67 (Dec)

Infrastructure Act 2015 (InA 2015)

InA 2015, ss 43-50 include rights for those holding onshore licences to 'use' 'deep level land' and set out supplementary provisions concerning payment schemes, notice and safeguards.

Deep level land is land 300 metres below the surface.

The rights granted to use deep level land include (see InA 2015, s 44(1)):

- drilling, boring, fracturing or otherwise altering it
- installing, keeping, using or removing infrastructure
- passing any substance through infrastructure within it

- putting, keeping and removing any substance into or from it
- leaving the land in a different condition and leaving any substance or infrastructure in it

The purposes for which the rights may be used include (see InA 2015, s 44(2)):

- searching for petroleum or deep level thermal energy
- assessing the feasibility of exploiting it
- preparing for exploiting it
- decommissioning and any other activity for the purpose of or in consequence of exploiting petroleum or geothermal energy

Landowners whose land has been subject to exercise of deep level use rights by another is not (see INA 2015, s 44(5)) liable in tort as landowner for any loss or damage attributable to that exercise.

The purpose of these new provisions is to sidestep:

- landowners' rights to prevent deep level trespass
- shortcomings of existing legislation to grant rights compulsorily to enter land to conduct hydraulic fracturing activities, and
- duties and liabilities landowners would otherwise have had in respect of neighbouring land as a result of hydraulic fracturing activities

The net effect is that so long as Petroleum Act 1998 licence holders have negotiated rights from landowners of areas within 300 metres of the surface, they can, subject to the qualifications mentioned below (and to obtaining the necessary environmental permits), do whatever is necessary to exploit shale oil and gas at lower levels.

The cocktail of provisions referred to above has been regarded by the onshore oil and gas industry as essential to its success. It has been promoted at a time when a new round of onshore oil licences across the UK is under negotiation.

The price of securing Parliament's consent to deep level rights has been a plethora of commitments and qualifications. This has been necessary to quell a back-bench rebellion within government, meet strong concerns voiced by the Environmental Audit Committee and calm the opposition.

The commitments and qualifications include:

- prohibitions on the issue of well consents unless they include conditions
- absolutely prohibiting hydraulic fracturing within 1,000 metres of the surface
- prohibiting hydraulic fracturing from taking place below 1,000 metres without the Secretary of State's consent
- requiring a number of conditions to be met before the Secretary of State issues such a consent--these conditions include:
  - environmental impacts having been taken into account by the local planning authority
  - appropriate arrangements having been made for independent inspection of well integrity
  - methane monitoring having been undertaken in the 12 months before hydraulic fracturing begins
  - arrangements for monitoring methane emissions into the atmosphere
  - prohibitions against hydraulic fracturing within 'protected groundwater areas' and 'other protected areas'
  - cumulative effects of hydraulic fracturing proposals having been taken into account
  - approval of substances to be used (or use of approved substances) in hydraulic fracturing
  - imposition of a restoration condition must have been considered by the local planning authority
  - relevant water undertakers must have been consulted
  - notice must have been given to the public of the application for planning permission

The list of conditions seems stringent. But in reality they do little more than reiterate a selected range of existing requirements. The majority are already integral to the process of securing planning permission, well consent and environmental permits for exploring and exploiting onshore shale oil and gas reserves. Notable 'additions' include absolute prohibitions on hydraulic fracturing within 'protected areas' and 'protected groundwater areas'. But the prohibitions are less prohibitive than first appeared.

When a deal was first struck to get the Bill through the third reading in the Commons, fracking was to be banned under or within areas of outstanding natural beauty (AONBs), National Parks or sites of specific scientific interest (SSSIs) and within groundwater protection zones. Faced with data collected to the effect that close to 40% of England overall, and 45% of the 931 blocks to be licensed would be at least 50% covered, the government swiftly recalibrated its drafting to match its intended position and pushed a revised clause in the House of Lords.

The position now is that both 'protected areas' and 'protected groundwater areas' are, by 31 July 2015, to be defined by statutory instrument. In other words, the hot potato has been passed to the incoming government. Moreover, during debate immediately before the Bill was passed for Royal Assent, it became clear that fracking activities were being contemplated under (if not within) AONBs, National Parks and SSSIs, and that even if the most sensitive groundwater protection zones (eg zone 1) would likely be off limits, those less sensitive (eg zones 2 and 3) most likely would not.

So, after much twirling, the drill bit seems back where it started and the stage is set for another bun fight when the July statutory instrument comes to be considered by the next Parliament.

R (on the application of Frack Free Balcombe Residents Association) v West Sussex County Council

The case was a judicial review of West Sussex County Council's grant of planning permission to Cuadrilla in May 2014 for exploration and appraisal comprising flow testing and monitoring of an existing hydrocarbon lateral borehole.

The decision of Gilbart J was a crushing rejection of a number of arguments dear to the anti-fracking movement.

Here, vigorous anti-fracking campaigners had sought to challenge West Sussex County Council's decision to grant planning permission for exploratory fracking at Lower Stumble Hydrocarbon Exploration Site, Balcombe.

The campaigners had argued that, in reaching its decision, West Sussex County Council had been wrongly advised that:

- it should leave matters of pollution control, air emissions and well integrity to the Environment Agency, Health & Safety Executive and other statutory bodies
- it should treat previous breaches of planning condition by Cuadrilla as immaterial
- the number of objections received to the application (as distinct from their content) was immaterial; and
- the issue of costs likely to be generated to deal with protests around the activities of Cuadrilla was immaterial

They had also argued that the Committee had been misled as to the views of Public Health England on air emissions monitoring and of the Health & Safety Executive on well integrity.

After dissecting arguments on each of the heads at length, Gilbart J concluded (at paras [132]-[4]):

> 'It was for [West Sussex County Council], and not for this Court, to determine the merits. It did so after a very full discussion and a thorough exploration of all the issues raised. It was entitled to consider that it could leave matters within the purview of the EA, the HSE and other statutory bodies and their regimes for those bodies to address. It had ample material to justify such an approach.
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> 'This application was for a lawful activity, which (and this has never been challenged in these proceedings) was a development which national and development plan policy supported, and which would be the subject of statutory control as well as planning conditions. The approach adopted by WSCC towards the relationship of planning control with other regulatory codes and regimes followed national policy guidance as repeatedly endorsed by the courts.

> 'In each respect argued by the Claimants as showing that those regulatory bodies were not able to deal with the proposals, the case for the Claimants has failed, both because the legal arguments neither addressed nor reflected long accepted principles, but also because the case that the Committee was misled was unsustainable on the facts.
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> 'The claimants' other grounds were also unsustainable.'

This decision will doubtless not deter attempts at judicial review of decisions elsewhere in the future. Nevertheless, the judgment set out existing law clearly. It signals once again that, however strong public opinion may be, the courts will not allow themselves to be arbiters of decision making merits and do not expect the planning system to pre-empt matters within the purview of other regulatory regimes. The decision will be much consulted by those advising planning authorities on applications elsewhere.

Conclusions

Recent developments have helped clarify a number of legal issues which have been troubling the onshore oil and gas industry--most importantly access to deep level land. Nevertheless, it is evident that some political battles have been left for another day, most notably definition of the areas to be protected from hydraulic fracturing activities, which are to be prescribed by regulations by 31 July 2015. This leaves some important practical and commercial decisions at large until after the May general election and seems certain to ensure that fracking features prominently during the early months of the next Parliament.

Interviewed by Jane Crinnion.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.